No. 84-1160

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BERTOLD J. PEMBAUR, M.D.,

Petitioner,

vs.

CITY OF CINCINNATI, OHIO, HAMILTON COUNTY, OHIO, HON. NORMAN A. MURDOCK, HON. JOSEPH M. DeCOURCY, JR., AND HON. ROBERT A. TAFT, II

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983?

STATEMENT OF INTERESTED PARTIES

Certain defendants originally named in the Complaint have not been listed as parties because petitioners believe that they are not interested in the outcome of this petition. Pursuant to that belief, there are no interested parties who have not been identified in the caption. Respondents Norman A. Murdock, Joseph M. DeCourcy, Jr., and Robert A. Taft, II are the commissioners of Hamilton County, Ohio and are named only in their official capacities as the county itself. *State ex rel. Commissioners* v. *Allen,* 86 Ohio St. 244 (1912); Findings of Fact, Opinion and Conclusions of Law (Appendix B at 14a).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Bertold J. Pembaur, M.D., plaintiff in the action below, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed on the 18th day of October, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, filed on October 18, 1984, is reproduced in Appendix A. The Findings

of Fact, Opinion And Conclusions of Law of the United States District Court, filed on April 5, 1983, is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was filed on October 18, 1984. This petition was filed within 90 days of October 18, 1984. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES:

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended December 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

STATEMENT OF THE CASE

Petitioner, Bertold J. Pembaur, M.D., is the sole proprietor of a medical clinic known as the Rockdale Medical Center, located in the City of Cincinnati, Hamilton County, Ohio.

On May 19, 1977, two unidentified persons dressed in plain clothes arrived in the reception area of the clinic and sought to enter the inner offices of the clinic. Learning of this, plaintiff barred shut the door between the public reception area and the private working areas of the clinic. (Tr. pp. 51, 69-70) Dr. Pembaur was then told that the two individuals were deputy sheriffs armed with capiases[1] to bring two of plaintiff's employees be-

[1] A capias is a writ of attachment issued pursuant to Ohio Revised Code Section 2317.21 to have a sheriff bring a person before the court or notary before whom a subpoenaed witness has failed to appear to answer for civil contempt.

fore the grand jury. (Joint Exhibit II and III, Tr. p. 134) The deputies asked the doctor to let them into the inner areas of the medical clinic to search for the named employees. Learning that the deputies had no search warrants (Tr. pp. 48-49), Dr. Pembaur refused entry. (Tr. 52)

Shortly thereafter, Cincinnati police officers arrived and also told plaintiff to permit them to enter to search for the persons named in the capiases. Dr. Pembaur again refused entry. (Tr. p. 52) The police officers called for a supervisor and a sergeant arrived, repeating the request to permit entry. (Tr. p. 53) Plaintiff continued to refuse to open his door absent a search warrant directed to him. (Tr. pp. 53, 135)

The deputies then, pursuant to department policy, called the sheriff's execution officer and were advised to call an assistant county prosecutor, defendant William Whalen. They called Whalen and advised him of the situation. Whalen spoke with Simon Leis, the Hamilton County Prosecutor, and told him that petitioner would not permit entry; Leis told Whalen to tell the deputies to "go in and get them." (Tr. pp. 53-54, 366)

Finally, more than two hours after their arrival (Tr. p. 56), the deputies, still without a warrant and after again being refused entry, sought to batter against the door to break it down. This failing, a Cincinnati police officer took a fire axe and chopped the door down. (Tr. p. 54) The deputies and police officers entered the private inner areas of the medical center and searched for the persons named in the capiases. (Tr. pp. 55, 71) The persons sought were not found. (Tr. p. 55)

Petitioner commenced this Civil Rights Action pursuant to 42 U.S.C. § 1983 in the Southern District of

Ohio, Western Division, against Hamilton County, Ohio, the City of Cincinnati, Ohio, and against certain individuals alleged to have violated the doctor's constitutional rights. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343(3). After a trial to the court, Findings of Fact, Opinion and Conclusions of Law were issued on April 5, 1983. The court ruled in favor of all the defendants, finding that the individual defendants were entitled to immunity and that the County and City were not liable because plaintiff had not suffered a constitutional deprivation committed pursuant to some official policy.

Upon appeal to the Sixth Circuit Court of Appeals, the court affirmed the trial court's holding as to Hamilton County, but reversed as to the City of Cincinnati, Ohio. The Court recognized that while the instructions to the deputy sheriffs "accorded with the law as it stood in 1977" based upon *Steagald* v. *United States*, 451 U.S. 204 (1981), plaintiff had suffered an "obvious constitutional violation." (Appendix A at 5a-6a)

The Appellate Court also ruled that both the county prosecutor and the county sheriff are elected officials who can establish official county policy to form the basis for the imposition of § 1983 liability. (Appendix A at 7a) The court upheld the lower court's ruling in favor of the county, however, on the ground that a "single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy." (Appendix A at 8a) The court also held that the Sheriff could not have ratified his deputies' conduct absent evidence of "acquiescing in a prior pattern of conduct." (Appendix A at 8a)[2]

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[2] One of the deputies testified, however, that on prior occasions they had served capiases on the property of persons other than the

REASONS FOR GRANTING THE WRIT

The basic issue in this petition is whether a unit of local government should be held liable for a single, discrete decision, made by an elected official whose acts are found to represent official policy, which proximately causes a person to be deprived of his constitutional rights. Petitioner believes that liability should attach in such a situation and that the decision of the courts below must be reversed.

The Court of Appeals found that Hamilton County, Ohio was not liable to plaintiff for the "obvious constitutional violation" he suffered, a patently illegal search of private medical offices, for the sole reason that the doctor "failed to establish . . . anything more than that on this *one occasion*, the Prosecutor and Sheriff decided to force entry into his office." (Appendix A at 8a) Thus, while the Court recognized that the prosecutor and sheriff are officials whose "acts represent the official policy of Hamilton County," the Sixth Circuit has adopted a rule that

> "[a] single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing governmental policy." (Appendix A at 8a)

This holding is both an erroneous interpretation of the official policy requirement under § 1983 as defined

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subject of the capias. (Tr. pp. 56-57) The Hamilton County Sheriff also testified that although he could not cite a specific example, he assumed forcible entries had been made to serve a capias on the property of a person sought to be apprehended. (Tr. pp. 222-223) He testified that after reviewing the situation it was his opinion that his deputies "acted fully and competently within their authority." (Tr. pp. 214-215)

by this Court and in conflict with decisions rendered by other circuit courts of appeals.

In *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978), this Court held that municipalities and other units of local government not entitled to Eleventh Amendment immunity are "persons" who may be liable under § 1983 for an unconstitutional action that "implements or executes a policy statement, ordinance, regulation *or decision* officially adopted and promulgated by that body's officers." 436 U.S. at 690 (emphasis supplied) The decision in *Monell* concluded that a governmental entity is liable under § 1983 where an injury is inflicted by the execution of a policy or custom "whether made by its lawmakers *or by those whose edicts or acts may fairly be said to represent official policy.*" 436 U.S. at 694 (emphasis supplied).

Monell, however, merely drew the outline for local government liability under § 1983; this Court specifically stated that it was not addressing the "full contours" of municipal liability under § 1983 and would "expressly leave further development of this action to another day." 436 U.S. at 695.

Owen v. *City of Independence*, 445 U.S. 622 (1980), raised the question of municipal immunity against the background of a single incident of alleged unconstitutional conduct based upon the interactive behavior of various city officials. In reaching the conclusion that local government entities are not entitled to immunity from liability for damages resulting from their unconstitutional acts, 445 U.S. at 657, this Court examined and relied upon historical situations where liability was imposed. Thus, while not discussing the official policy question directly, it was recognized that:

> "A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation. T. Sherman & A. Redfield, A Treatise on the Law of Negligence § 120, p. 139 (1869)." 445 U.S. at 640.

Quoting Chief Justice Shaw's decision in *Thayer* v. *Boston,* 36 Mass. 511, 515-516 (1837), this Court noted that:

> "if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done." 445 U.S. at 641.

It can therefore be concluded that since the Civil Rights Act was adopted to afford relief for constitutional deprivations caused by the "misuse of power, possessed by virtue of state law," *Monroe* v. *Pape,* 365 U.S. 167, 184 (1968); *Owens* v. *City of Independence,* supra, 445 U.S. at 650, a rule such as that adopted by the Sixth Circuit, effectively exempting a local governmental entity from liability for the first unconstitutional act directed by a policy-making official, defeats the very purpose of § 1983. Particularly where, as here, the govern-

ment officials are found to enjoy immunity, the Sixth Circuit holding leaves the injured person without remedy or relief.

This is not a case where the plaintiff seeks to find official policy in some custom, practice or inaction. See, e.g. *Gilmere* v. *City of Atlanta,* 737 F.2d 894 (11th Cir. 1984); *Turpin* v. *Mailet,* 579 F.2d 152 (2d Cir. 1978), vacated *sub. nom. City of West Haven* v. *Turpin,* 439 U.S. 974 (1978), *cert. denied,* 439 U.S. 998 (1978); *Smith* v. *Ambrogio,* 456 F.Supp. 1130 (D. Conn. 1978). Those courts apparently would recognize governmental liability for a single, discrete decision by a policy-making official. See *Gilmere* v. *City of Atlanta, supra,* 737 F.2d at 901 (implementation or execution of "policy statement, ordinance, resolution or decision" that is "the moving force of the constitutional violation" establishes governmental liability, citing *Monell, supra,* 436 U.S. at 690-691 and *Polk County* v. *Dodson,* 454 U.S. 312, 326 (1981)); *Turpin* v. *Mailet,* 619 F.2d 196, 202 n. 7 (2d Cir. 1980), *cert. denied,* 449 U.S. 1016 (1980); *Smith* v. *Ambrogio, supra,* 465 F.Supp. at 1134 n. 3. Where a plaintiff seeks to find official policy in custom, practice, or inaction, a single discrete act by a deputy sheriff, rather than by an elected policy-making official, would not, and should not, form the basis for governmental liability.

On the other hand, we have here a specific decision and direct order by a county official who has policy-making authority to "go in and get them." The result of this direct order to the deputy sheriffs was the deprivation of petitioner's constitutional right to be secure from unreasonable searches.

Clearly, a unit of local government should be liable for the decisions of its policy-makers, be it the first oc-

casion or an oft-repeated situation, which directly cause the deprivation of an individual's constitutional rights. An elected county prosecutor is certainly one "whose edicts or acts may fairly be said to represent official policy." *Monell, supra,* 436 U.S. at 694. There is simply no reason to grant a unit of local government immunity from liability for the first edict or act in a particular area which causes a constitutional deprivation.

Petitioner believes that this is the appropriate case in which to resolve this substantial issue of federal law. The courts below have already held that the decision of the elected county prosecutor to "go in and get them" proximately caused petitioner to suffer a constitutional deprivation under color of state law. The official policy question is thus the only issue to be resolved.

Not only have the trial and appellate court rulings here erroneously decided a federal question of substance, but the Circuit Court's decision conflicts with the holdings on this very issue by other Courts of Appeals and District Courts.

Recently, the Eighth Circuit specifically addressed the question of whether a county may be liable under § 1983 for a single decision of a county official. In *Sanders* v. *St. Louis County,* 724 F.2d 665, 668 (8th Cir. 1983), the court stated:

> "It may be that one act of a senior county official is enough to establish the liability of the county, if that official was in a position to establish policy and if that official himself directly violated another's constitutional rights. See *Monell,* 436 U.S. at 694, 98 S.Ct. at 2037; *Quinn* v. *Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 448 (2d Cir. 1980); *Bowen* v. *Watkins,* 669 F.2d 979, 989-90 (5th Cir. 1982)."

The Fifth Circuit, in several cases, has held that a local government may be liable where its official policy-makers "by direct orders" set a course of action which results in the deprivation of a constitutional right. *Bennett* v. *City of Slidell,* 728 F.2d 762, 767 (5th Cir. 1984). There, the city was found not to be liable because the government officials, a city attorney and building inspector, were held not to be among "those whose edicts or acts may fairly be said to represent official policy." 728 F.2d at 769. The court specifically recognized, however, that elected county officers derive authority to set governmental policy in certain areas from the electorate. 728 F.2d at 765-66, nn. 1 & 2.

In *Van Ooteghem* v. *Gray,* 628 F.2d 488 (5th Cir. 1980), *modified en banc,* 654 F.2d 204 (5th Cir. 1981), *cert. denied,* 455 U.S. 909 (1982), the court held that the improper discharge of an employee by an elected county official, a single, discrete decision, represented the official policy of the county. 628 F.2d at 495. Similarly, in *Familias Unidas* v. *Briscoe,* 619 F.2d 391, 404 (5th Cir. 1980), the court recognized that the official conduct and decisions of an elected county official "must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held responsible under section 1983."

Finally, the district court in *Himmelbrand* v. *Harrison,* 484 F.Supp. 803, 810 (W.D. Va. 1980), relying on *Monell, supra,* 436 U.S. at 694, and *Smith* v. *Ambrogio,* 456 F.Supp. 1130, 1134 n. 3 (D. Conn. 1978), stated that "discrete" acts of government officials may represent official policy even where they are directed at only a single individual, where the conduct of the government official may "fairly be said to represent official policy."

CONCLUSION

The ruling of the Circuit Court, exempting from liability the first incident of unconstitutional conduct caused by a policy-maker's decisions, effectively emasculates the Civil Rights Act as a remedy for injuries suffered by reason of the misuse of governmental power. A unit of local government should be held liable under § 1983 to the injured individual where a policy maker, be it a city council or an elected county official, makes a decision which the body or person has the authority to make, that directly sets a course of action resulting in the deprivation of a constitutional right.

For the reasons stated, a Writ of Certiorari should issue to review the judgment of the Court of Appeals in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3325

BERTOLD J. PEMBAUR, M.D.,
Plaintiff-Appellant,

v.

CITY OF CINCINNATI; HAMILTON COUNTY; HON. NORMAN MURDOCK, COUNTY COMMISSIONER; HON. ROBERT A. TAFT, II, COUNTY COMMISSIONER; WILLIAM P. WHALEN, JR.; AND RUSSELL L. JACKSON,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed October 18, 1984

Before: KENNEDY and JONES, Circuit Judges; and COHN, District Judge.*

* The Honorable Avern Cohn, United States District Court for the Eastern District of Michigan, sitting by designation.

JONES, Circuit Judge. This matter is before the Court on the appellant's appeal from the district court's order dismissing his civil rights action under 42 U.S.C. § 1983.

The appellant, Bertold J. Pembaur, a licensed doctor specializing in family medicine, maintains an office known as the Rockdale Medical Center (Center), which is located at 430 Rockdale Avenue in Cincinnati. During the spring of 1977, the Hamilton County Grand Jury indicted Pembaur in a six-count indictment. During the investigation of the charges, subpoenas were issued for the appearance of two of Pembaur's employees before the Grand Jury. These employees failed to appear at the designated time and capiases or writs of attachment were issued for their arrest.

On May 19, 1977, two deputy sheriffs from the Hamilton County Sheriff's Department appeared at the Center without a search warrant to serve the capiases which listed the employees' home addresses and not the Center's address. Upon their arrival, Pembaur refused to let them into the inner offices to search for the employees. In fact, he barricaded the door to those offices, called the press and the Cincinnati Police Department, and continued to refuse access to the inner offices.

Because of Pembaur's actions, one of the deputies called the Sheriff's office who advised him to call William P. Whalen, Jr., an assistant prosecuting attorney for Hamilton County. Simon Leis, prosecutor at the time, told Whalen to instruct the officers to serve the capiases. When the deputies were unsuccessful in their attempt to force the door, a Cincinnati police officer took an axe and chopped the door down which enabled the deputies and police officers to enter the inner offices. The employees, however, were not found.

Subsequently, Pembaur filed a civil rights action in the district court under § 1983 alleging deprivation of his Fourth and Fourteenth Amendment rights. Pembaur named the City of Cincinnati (City), Hamilton County (County), the Hamilton County Commissioners in their official capacity (Commissioners), the Chief of the Cincinnati police department, the Hamilton County Sheriff, William Whalen, six unnamed Cincinnati police officers, two unnamed deputy sheriffs, and Russell Jackson, a Secret Service officer appointed by the county prosecutor pursuant to state law as defendants. After a bench trial, the district court made certain findings of fact and conclusions of law and, as a consequence, dismissed Pembaur's action in its entirety. On appeal, Pembaur raises only the dismissal of his claims against Whalen, the County, and the City as grounds for reversal.

In a case tried to the court, the district court's findings of fact will be set aside only if they are clearly erroneous. Fed. R. Civ. P. 52 (a). A factual finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Kennedy* v. *Commissioner*, 671 F.2d 167, 174 (6th Cir. 1982) (citing *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948)). Ultimate findings of fact, however, are subject to *de novo* review, as are the district court's conclusions of law, because they require the application of legal principles. *See Roth Steel Products* v. *Sharon Steel Corp.*, 705 F.2d 134, 143 & n.19 (6th Cir. 1983). We turn now to a review of the district court's factual and legal findings.

I

As to Pembaur's claim against Whalen, the district court concluded that Whalen was entitled to at least a good faith immunity for his role in the events that led to the lawsuit and that Whalen's actions had not violated any clearly established statutory and constitutional rights of Pembaur. Thus, the court held that Whalen could not be held liable for any damages.

On appeal, Pembaur concedes that Whalen was entitled to good faith immunity. He contends, however, that the district court erred in finding that Whalen's actions did not violate any clearly established constitutional right.

In *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Thus, before applying the shield of good faith immunity we must make two determinations. First, we must determine what the applicable law was at the time of the alleged violation. Second, we must determine whether that law was clearly established. *Id.*

In *United States* v. *McKinney,* 379 F.2d 259, 263 (6th Cir. 1967), we held that a search warrant is not necessary to execute an arrest warrant on the premises of a third party if the authorities have probable cause to believe that the suspect could be found on the premises. We reasoned that "even if we were to accept appellant's premise that a search warrant must be obtained in the absence of exceptional circumstances, there is good reason to hold that the issuance of an arrest warrant is itself an exceptional cir-

cumstance obviating the need for a search warrant." Id. at 263 (footnote omitted). Pembaur asserts that this rule of law was changed in 1974 by this Court's opinion in *United States* v. *Shye,* 492 F.2d 886 (6th Cir. 1974). We disagree.

In *Shye,* we followed the D.C. and Fourth Circuits by holding that a warrantless entry of a residence by authorities to effect an arrest was on the same constitutional footing as a warrantless entry to conduct a search; both are per se unreasonable absent exigent circumstances. 492 F.2d at 891, 893 (following *Dorman* v. *United States,* 435 F.2d 385 (D.C. Cir. 1970) (en banc); *Vance* v. *North Carolina,* 432 F.2d 984 (4th Cir. 1970)). We upheld the arrests in *Shye,* however, because we found that they were justified by exigent circumstances. *Id.* at 892. Pembaur's argument ignores a factual distinction between *Shye* and *McKinney;* the arrests in *Shye* were made *without* a warrant. The distinction is critical because *McKinney* indicated that the issuance of an arrest warrant itself could be "an exceptional circumstance obviating the need for a search warrant." 379 F.2d at 263. Consequently, *Shye* did not change the rule of *McKinney.* Indeed, that rule was not changed until four years *after* the actions complained of by Pembaur. *See Steagald* v. *United States,* 451 U.S. 204 (1981). Whalen's actions, therefore, did not violate any clearly established constitutional right. In fact, his instructions to the officers accorded with the law as it stood in 1977. Accordingly, he was entitled to the defense of good faith immunity and the dismissal of the damage claims against him was proper. No injunctive or declaratory relief was sought.

II

Pembaur also sought to impose liability on the County for the actions of the Sheriff and the Prosecutor. The district court, however, concluded that the County could not be held liable for the policies of the Sheriff because the Sheriff was not subject to the control of the Board of Commissioners (Board), the County's governing body. The court reasoned that the Sheriff's powers and duties were established by the state legislature, a fact which presumably rendered them state officials. Although the district court did not decide whether the County could be held liable for the policies of the Prosecutor, it did hold that Pembaur suffered no constitutional deprivation as a result of county policy or custom.[1]

In *Monell* v. *Department of Social Services,* 436 U.S. 658, 694 (1978), the Supreme Court held that a local government can be liable in a § 1983 action when its official policy or governmental custom is responsible for a deprivation of constitutional rights.[2] Apparently recognizing that a local government's "official policy" can originate from more than one source, the Court stated ". . . it is when execution of a government's policy or custom, *whether*

[1] Because it is clear that authorities may not legally search for the subject of an arrest warrant in the home or office of a third party without first obtaining a search warrant, *Steagald,* 451 U.S. 204 (1981), we must read this language as indicating that, in the district court's view, the obvious constitutional violation that occurred in this case did not result from the policy or custom of either the County or City.

[2] The Court in *Monell* specifically noted that the § 1983 liability may not be premised upon a respondeat superior theory. 436 U.S. at 691; *accord Local No. 1903 UAW* v. *Bear Archery,* 617 F.2d 157, 160 (6th Cir. 1980).

made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* (emphasis added). *See also Owen* v. *City of Independence,* 445 U.S. 657-58 (1980). Thus, the Board's lack of control does not necessarily preclude a finding of liability on the part of the County. We must determine whether the nature and duties of the Sheriff are such that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter.

Initially, we note that, the district court is incorrect to the extent that its decision implies that the Sheriff is not a County official. The Sheriff is elected by the residents of the County, OHIO REV. CODE ANN. § 311.01 (Baldwin 1982), and serves as the "chief law enforcement officer of the county." 1962 Op. Att'y Gen. No. 3109. He submits his budget requests to the Board, OHIO REV. CODE ANN. § 311.20, which in turn furnishes his office, books, furniture, and other materials. OHIO REV. CODE ANN. § 311.06. His salary and all training expenses are also paid out of the general county fund. OHIO REV. CODE ANN. §§ 325.01-06. Although none of these factors is itself determinative, we believe it is obvious that the Sheriff is a County official. Moreover, we believe that the duties of the Sheriff, as enumerated in OHIO REV. CODE ANN. § 311.67, and his responsibility for the neglect of duty or misconduct of office of each of his deputies, *see* OHIO REV. CODE ANN. § 311.05, clearly indicate that the Sheriff can establish county policy in some areas. We conclude, therefore, that, in a proper case, the Sheriff's acts represent the official policy of Hamilton County and, as such, may be the basis for the imposition of § 1983 liability.[3]

[3] Although there appears to be no dispute, we also believe it is clear that the Prosecutor also establishes county policy.

This, however, does not end our inquiry. To impose liability upon the county, Pembaur "must identify the policy, connect the policy to the [county] and show that the particular injury was incurred because of the execution of that policy." *Bennett* v. *City of Slidell,* 728 F.2d 762, 767 (5th Cir. 1984) (en banc). We believe that Pembaur failed to prove the existence of a county policy in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this *one occasion,* the Prosecutor and the Sheriff decided to force entry into his office. *See Rowland* v. *Mad River Local School District,* 730 F.2d 444, 451 (6th Cir. 1984). That single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy.[4] Accordingly, the district court properly dismissed the claim against the County.

III

We believe, however, that the district court erred in dismissing Pembaur's claim against the City. The district court concluded that the only policy or custom followed by officers of the Cincinnati Policy Division was that of

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[4] Pembaur's ratification theory is also insufficient to impose liability on the County. In *Turpin* v. *Mailet,* 619 F.2d 196 (2d Cir.), *cert. denied,* 449 U.S. 1016 (1980), which was cited by Pembaur, the Second Circuit recognized that a governmental policy could be established by ratification. That court held, however, that "absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct, a policy could not ordinarily be inferred from a single incident of illegality . . . ." *Id.* at 202. Pembaur has failed to prove any prior pattern of conduct.

aiding the deputies in the performance of their duties. This finding is clearly erroneous. Myron Leistler, the Chief of Police for Cincinnati, testified that the policy and past practice of his department was to use whatever force was necessary, including forcible entry, to serve a capias. He also testified that capiases are served routinely on the premises of persons who are not the subjects identified in the capiases. This testimony identifies the policy and connects that policy to the City. It is unclear, however, whether Pembaur's injury was incurred as a result of the execution of the policy. Because the district court erroneously identified the policy at issue, it did not make this determination. We therefore, remand this case to the district court to make this determination.

IV

For the reasons outlined above, we AFFIRM the dismissal of the claims against Whalen and the County. The dismissal of the claims against the City is VACATED and the case is REMANDED for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3325

BERTOLD J. PEMBAUR, M.D.,

Plaintiff-Appellant,

v.

CITY OF CINCINNATI, et al.,

Defendants-Appellees.

Before: KENNEDY and JONES, Circuit Judges; and COHN, District Judge.

JUDGMENT

(Filed October 18, 1984)

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part, vacated in part and the case is remanded for proceedings consistent with this opinion.

Each party is to bear its own costs in this appeal.

ENTERED BY
ORDER OF THE COURT

/s/ JOHN P. HEHMAN, Clerk

Issued as Mandate: November 12, 1984

A True Copy.

Attest:

/s/ HENRY MacARTHUR
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-81-412

BERTOLD J. PEMBAUR,

Plaintiff

v.

CITY OF CINCINNATI, OHIO, et al.,

Defendants

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

(Filed April 5, 1983)

This matter is before the Court following trial and the presentation of evidence and testimony. Plaintiff seeks damages from defendants for asserted violations of 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments of the Constitution of the United States. In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court does submit herewith its Findings of Fact, Opinion and Conclusions of Law.

Introduction

This litigation is but the latest in a long series of disputes between the plaintiff Bertold J. Pembaur and the State of Ohio, Hamilton County, Ohio and employees of each. The underlying dispute began in 1977 when the plaintiff herein, Bertold J. Pembaur, was indicted by the Grand Jury of Hamilton County, Ohio. The resulting criminal prosecution and collateral civil action have occupied the attention of the court system of Ohio, including the Courts of Common Pleas of Hamilton County, Ohio, the First District Court of Appeals of the State of Ohio and the Supreme Court of Ohio. The only issues presented to the Court concern a search of the premises of plaintiff on April 26, 1977 and an effort to serve two capiases issued by the Court of Common Pleas of Hamilton County, Ohio on May 19, 1977.

I. Findings of Fact

(A) The Parties

(1) Plaintiff Bertold J. Pembaur:

Bertold J. Pembaur is a doctor licensed to practice in the state of Ohio. He specializes in "family medicine." Dr. Pembaur maintains an office known as the Rockdale Medical Center, 430 Rockdale Ave., Cincinnati, Ohio. Within this center in 1977, Dr. Pembaur maintained a staff of approximately 20 persons. The bulk of Dr. Pembaur's income during the years preceding and immediately following 1977 was received from various welfare agencies for his treatment of persons who were entitled to welfare income. (Pltf's. Exs. 23, 24, 25, 26, 27a; Defs'. Ex. G). Dr. Pembaur was indicted by the Grant Jury of Hamilton County, Ohio in April of 1977 in a six-count indictment charging violations of Ohio Revised Code §§ 2913.02,

2913.51, 2923.03, 2921.31, 2921.32. Dr. Pembaur was subsequently acquitted of all counts of the indictment.

(2) Defendants:

a. The City of Cincinnati is a municipal corporation chartered in accordance with the Constitution of the State of Ohio. It maintains a police force with Myron Leistler as Chief. The office of Dr. Bertold Pembaur at 430 Rockdale Avenue is located within the municipal corporation limits of the City of Cincinnati.

b. Hamilton County, Ohio

Hamilton County, Ohio is one of 88 counties in the State of Ohio. It is located in the extreme southwestern corner of the state. The City of Cincinnati is a municipal corporation within Hamilton County. Pursuant to Chapter 305 of the Revised Code of Ohio, the County Commissioners at the time of this lawsuit were Norman Murdock, Robert A. Wood and Robert A. Taft, II. The Board of County Commissioners according to Ohio law is a quasi-corporation and constitutes both agents of the county and the county itself. *State ex rel Commissioners* v. *Allen,* 86 Ohio St. 244.

c. William P. Whalen, Jr.:

William P. Whalen, Jr. is an Assistant Prosecuting Attorney of Hamilton County, Ohio who was serving in 1977 under the elected Prosecuting Attorney Simon L. Leis, Jr. Mr. Whalen was appointed pursuant to Ohio Revised Code 309.06.

d. Russell Jackson:

Russell Jackson is a Secret Service Officer appointed by the Prosecuting Attorney of Hamilton County pursuant to Ohio Rev. Code 309.07. A Secret Service Officer in Ohio serves for such term as the Prosecuting Attorney deems advisable and he is subject to termination at any time by such Prosecuting Attorney. *Id.*

(B) The Incident of April 26, 1977

Defendant Russell Jackson appeared on the morning of April 26, 1977, before The Honorable Donald Schott, Judge of the Hamilton County Municipal Court and sought a search warrant asserting a violation of Ohio Rev. Code 2913.02 entitled "Theft of State Funds." (Joint Ex. 1). Pursuant to such affidavit, The Honorable Donald Schott issued a search warrant to the Police Chief of Cincinnati authorizing a search of the Rockdale Medical Center, 430 Rockdale Avenue, Cincinnati, Ohio and a specific search for "all medical filed (sic) of patients who are welfare recipients for the years 1975, 1976 and 1977 and billing records on all patients on welfare for the years 1975, 1976, 1977; accounts payable records for laboratory services for the years 1975, 1976, 1977; employment records for the years 1975, 1976, 1977; payroll records for the years 1975, 1976, 1977." In accordance with such search warrant, Mr. Jackson, accompanied by representatives of the Police Division of the City of Cincinnati and of the Ohio Department of Welfare, conducted a search of the premises and removed therefrom in excess of 30,000 individual records.

A taped inventory of the documents seized were given to attorney William Flax representing Dr. Pembaur, before May 1, 1977. On May 9, 1977 approximately 90% of all records obtained were returned to Dr. Pembaur.

On August 8, 1977 after an indictment was returned against Dr. Pembaur, a Motion was made on his behalf to suppress evidence. (Defs.' Ex. A). The Motion asserted deficiencies in the Affidavit for a search warrant and specifically violations of the Fourth, Fifth, Ninth and Fourteenth Amendments. On September 21, 1977, the Motion to Suppress was denied and an entry so finding was entered nunc pro tunc on September 21, 1977 (Defs.' Ex. B).

On April 29, 1977, a suit was brought on behalf of Dr. Pembaur in the Court of Common Pleas of Hamilton County, Ohio, No. A-7703347 (Defs.' Ex. E). Among other defendants were listed William Whalen, Assistant Prosecuting Attorney of Hamilton County, Ohio and Russell Jackson, Investigator for Prosecuting Attorney of Hamilton County, Ohio. Paragraph 9 of that Complaint provided as follows:

> That provided with such search warrant, the defendants Whalen, Jackson, Heavrin (Russell F. Heavrin of the Ohio State Highway Patrol) and others illegally seized all of the records listed therein and the equivalent personal records of the plaintiff for the same periods on April 26, 1977 and removed the same to the offices of the defendant, Leis (Simon L. Leis, Prosecuting Attorney of Hamilton County, Ohio) wherein they have been held ever since in violation of the Fourth and Fifth Articles of Amendment to the Constitution of the United States. . .

On March 25, 1980, the cause of action was dismissed for failure of the plaintiff to prosecute. *See* Ohio Civ. R. 41 (B). An entry dismissing the claim with prejudice was entered by the Court of Common Pleas. On June 3, 1981, the Court of Appeals for the 1st Appellate District of Ohio in Case No. C-800293 affirmed the dismissal by the trial

court but reversed its dismissal "with prejudice" and stated as follows:

> We hereby reverse the Judgment below. Rendering the judgment to which the appellant is entitled, we dismiss the Complaint herein without prejudice.

On July 21, 1982, the Supreme Court of Ohio reversed the Court of Appeals for the 1st Appellate District in *Pembaur* v. *Leis,* 1 Ohio St. 3d 89 (1982), stating:

> Pursuant to Civil Rule 42 (B) (1), it is not an abuse of discretion for the trial court to dismiss an action with prejudice for lack of prosecution when a plaintiff voluntarily fails to appear at a hearing without explanation when the Court has directed him to be present and his location is unknown. *Id.* at 92.

(C) The Events of May 19, 1977

(1) In the ensuing Grand Jury investigation of the charges against Dr. Pembaur, two employees of his, Marjorie McKinley and Kevin Maldon, were directed to appear before the Grand Jury. Ms. McKinley was directed to appear on May 19, 1977. Mr. Maldon was directed to appear on April 29, 1977. Neither witness did so appear and accordingly, two Judges of the Court of Common Pleas of Hamilton County, Ohio, separately issued capiases for the arrest and detention of each witness.

(2) The capias for Marjorie McKinley was issued by The Honorable Robert Gorman on May 19, 1977 (Joint Ex. II) and contained the following language:

> To the Sheriff of Hamilton County, Ohio: Upon receipt of a certified copy of this Entry Ordering Capias Issued For Witness, you are hereby commanded to take and to bring before this Court the witness, Marjorie McKinley, whose address is 1138 Laidlow Ave-

nue, to answer for contempt in failing or refusing to obey the command of a subpoena lawfully served on her in the within cause.

(3) A capias for the arrest and detention of Kevin Maldon was issued by The Honorable Robert Kraft, Judge of the Court of Common Pleas of Hamilton County, Ohio, on April 29, 1977 (Joint Ex. III) and it contained the following language:

> To the Sheriff of Hamilton County, Ohio: Upon receipt of a certified copy of this Entry Ordering Capias Issued For Witness, you are hereby commanded to take and to bring before this Court the witness Kevin Maldon, whose address is 865 North Hill Lane, to answer for contempt in failing or refusing to obey the command of a subpoena lawfully served on him in the within cause.

(4) Deputy Sheriff Frank Webb and David Lane attempted to serve the capiases upon the named individuals at their place of employment, Rockdale Medical Center, 430 Rockdale Avenue. The Sheriff's Deputies identified themselves as such but were denied entrance into the premises by plaintiff, Dr. Pembaur. Witness Marjorie McKinley was on the premises at the time. Witness Kevin Maldon was probably on the premises at the time. Plaintiff Dr. Pembaur refused to unlock a locked door and in addition further barricaded such door with a piece of wood. Dr. Pembaur summoned Officers of the Cincinnati Police Division and called members of the communications media including television station WCPO which thereupon sent representatives to the premises. The above-mentioned Sheriff's Deputies arrived at the premises at approximately 2:00 P.M., members of the Cincinnati Police Division appeared at approximately 2:20 P.M. Dr. Pembaur continued to refuse to permit entry into the premises and at some time between 4:00 and 4:15 P.M., the door in question was broken in and representatives of the Sheriff's office and the Cincinnati Police Division proceeded to search the premises. Neither witness McKinley nor Maldon were found on the premises. Defendant Whalen did not appear at the premises until after the door had been broken in and defendant Jackson at no time appeared upon Dr. Pembaur's premises on May 19th.[1]

II. Opinion

(A) Res Judicata

The liability of defendants in this action must first be examined in light of the previous litigation engaged in by the parties. Defendants have first argued that claims involving the April 26 search warrant and the evidence seized thereunder may not be considered by this Court in view of the previous entry denying a Motion to suppress such evidence in criminal case No. 771779-A and B (County Ex. B). It is the assertion of plaintiff, however, that based upon *United States* v. *Wallace* & *Tiernan,* 336 U.S. 793 (1949) and *Jones* v. *Saunders,* 422 F.Supp. 1054 (E.D. Pa. 1976), the denial of a Motion to Suppress does not prevent a reconsideration of the alleged Constitutional deprivation, particularly in view of the fact that plaintiff herein was acquitted. The Court notes in passing that

[1] The only other individually named defendants, Norman Murdock, Robert A. Wood and Robert A. Taft, II, were at the time of this lawsuit the County Commissioners of Hamilton County, Ohio. No personal participation in any of the events herein are attributed to such defendants. By stipulation of plaintiff, such defendants are listed in their official capacity only and as representatives of Hamilton County, Ohio.

United States v. *Wallace* & *Tiernan* does not deal with the situation herein presented and the determination of *Jones* v. *Saunders* is a determination of the United States District Court for the Eastern District of Pennsylvania which is not binding upon this Court.

It is not, however, necessary to reach this point. Defendants' second and more compelling *res judicata* argument involves Civil Case A-7703347 (County Ex. E). In that case, the Supreme Court of Ohio ultimately determined that the dismissal with prejudice for failure to prosecute was an adjudication on the merits of the matters urged in that action. Therefore, the principle of *res judicata* applies: "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been* raised in that action." *Federated Department Stores, Inc.* v. *Moitie,* 452 U.S. 394, 398 (1981) (emphasis added).

The question of *res judicata* particularly bears upon the liability of defendant Russell Jackson, since his sole participation in the April 26 incident was an appearance before a Judge of the Hamilton County Municipal Court to obtain a search warrant and a participation in the search. The testimony is clear that Mr. Jackson was not present on May 19 when the two capiases were attempted to be served. There is no doubt that Paragraph 9 of County Defendant's Exhibit E deals with violations of the Fourth and Fifth Amendments to the Constitution of the United States. The paragraph states specifically:

> That provided with such search warrant, the defendants Whalen, Jackson, Heavrin and others illegally seized all of the records listed therein and the equivalent personal records of the plaintiff for the same period on April 26, 1977 and removed the same to the offices of the defendant Leis wherein they have been

> held ever since in violation of the Fourth and Fifth Articles of Amendment (sic) of the Constitution of the United States. . .

If indeed the search and seizure was a violation of the Fourth and Fifth Amendments in any respect, the final judgment in state court precludes such as assertion here. *Castorr* v. *Brundage,* 674 F.2d 531, 536 (6th Cir.), *cert. denied,* — U.S. — (1982).

(B) Good Faith

Defendant Whalen, as Assistant Prosecuting Attorney, is appointed by the Prosecuting Attorney to aid him in the performance of his duties. *See* Ohio Rev. Code § 309.16. When acting in his official capacity, the Assistant Prosecutor partakes of the same immunity from suit enjoyed by the Prosecuting Attorney. *See Macko* v. *Bryon,* 641 F.2d 447 (6th Cir. 1981).

It is clear that a prosecuting attorney under *Imbler* v. *Pachtman,* 424 U.S. 409 (1976), has absolute immunity in his role as a prosecutor. It is not equally clear whether a prosecuting attorney has absolute immunity in all of his activities. In *Imbler,* the Supreme Court of the United States made the following observation:

> We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrative or investigative officer rather than that of advocate. . . *Id.* at 430.

However, even if a prosecutor's acts involve those aspects of his responsibility that fall outside the scope of his absolute immunity, he is still entitled to a qualified or "good faith" immunity. *See Scheuer* v. *Rhodes,* 416 U.S.

232 (1974); *Walker* v. *Cahalan,* 542 F.2d 681, 685 (6th Cir. 1976), *cert. denied,* 429 U.S. 1092 (1977).

Recently, the Supreme Court of the United States discussed the issue of good faith immunity. *Harlow* v. *Fitzgerald,* — U.S. —, 50 U.S.L.W. 4815 (June 24, 1982). Citing *Butz* v. *Economou,* 438 U.S. 478, the Court pointed out "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.* at 4817.

The Court considered a situation where a qualified immunity would not be available. Quoting *Wood* v. *Strickland,* 420 U.S. 308 (1975), the Court stated:

> We have held that qualified immunity would be defeated if an official *"knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the Constitutional rights of the [plaintiff] *or* if he took the action *with malicious intention* to cause a deprivation of Constitutional rights or other injury. . ." *Harlow, supra* at 4819. (emphasis and brackets in original).

Concluding that "bare allegations of malice" should not serve to subject officials to the costs of trial or the burdens of discovery, the Court held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* at 4820. The Court reasoned:

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. . . *Id.*

Citing *Pierson* v. *Ray,* 386 U.S. 547, 554 (1967), the Court concluded:

> Where an official could be expected to know that certain conduct would violate statutory or Constitutional rights, he should be made to hesitate. . . but where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.' *Harlow, supra* at 4820.

Under the foregoing standards, it is clear that defendant Whalen is shielded from liability for damages in connection with his activities on April 26 and May 19, 1977. His conduct did not in any way "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*

The Court has already concluded that plaintiff is barred by the doctrine of *res judicata* from asserting his claims against defendant Jackson in connection with the April 26, 1977, incident. In addition, however, the Court notes that defendant Jackson is also entitled to good faith immunity, under the same standards applied to defendant Whalen's actions. Furthermore, the rationale in *United States* v. *Ventresca,* 380 U.S. 102 (1965), appears to be pertinent. There, the Court made the following observation:

> If the teachings of the Court's cases are to be followed and the Constitutional policy served, affidavits for search warrants such as the one involved here must be tested and interpreted by Magistrates and Courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area. A grudging or negative attitude by reviewing courts towards war-

> rants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. *Id.* at 108.

The Court also stated:

> In our view, the Officers in this case did what the Constitution requires. They obtained a warrant from a judicial officer 'upon probable cause supported by oath or affirmation and particularly described the place to be searched and . . . things to be seized.' It is vital that having done so, their actions should be sustained under a system of justice responsive both to the needs of individual liberty and the rights of the community. *Id.* at 112.

It is clear that Mr. Jackson did precisely what the Court suggested in *Ventresca.* He prepared an affidavit and he appeared before a judicial officer who issued a search warrant. At that point, Mr. Jackson had done all that any law enforcement officer is required to do. An attempt to penalize him is contrary both to the principle of good faith immunity and to the law as set forth in *Ventresca, supra.*

The issue of good faith likewise bears upon the activities of other law enforcement officers on May 19th. Sheriff's Deputies, subsequently assisted by Officers of the Cincinnati Police Division, pursuant to capiases issued by Judges of the Court of Common Pleas of Hamilton County, Ohio used force to gain entrance into the Rockdale Medical Clinic.[2] On May 19, 1977, the law of this Circuit stated unequivocally that a law enforcement officer seek-

[2] Ohio Rev. Code § 2935.12 specifically authorizes an officer to "break down an outer or inner door" if he is refused admittance when executing an arrest warrant.

ing to execute a capias did not need a search warrant when he appeared upon the premises of a third person. *United States* v. *McKinney,* 379 F.2d 259 (6th Cir. 1967). Without question, such is no longer the law. *Steagald* v. *United States,* 451 U.S. 204 (1981). In view, however, of the observation of the Supreme Court in *Harlow, supra,* that "an official could not reasonably be expected to anticipate subsequent legal developments. . . .," and the fact that the activities of both the Deputy Sheriffs and the Cincinnati policemen were in accordance with the appropriate law at that time, an effort to hold them liable in connection with the May 19 incident must fail.

C. Liability of Local Governing Entities

Both the City of Cincinnati and Hamilton County, Ohio are parties defendant in this action. The law is clear that a municipal corporation is a "person" within the meaning of 42 U.S.C. § 1983[3] and may be liable thereunder. *Monnell* v. *New York City Department of Social Services,* 436 U.S. 658 (1978). The same is true of counties. *Monnell, supra,* at 690 (local government units "persons" under § 1983 if not part of state for Eleventh Amendment purposes); Ohio Rev. Code § 2743.01 ("state" defined not to include counties). *See also Mount Healthy Board of Edu-*

[3] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

cation v. *Doyle,* 429 U.S. 274, 280 (bar of Eleventh Amendment does not extend to counties.)

A local government may be liable under § 1983 if the action complained of implements or executes a policy statement, ordinance, regulation or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy. *Monnell, supra,* at 690, 694. In addition, local governments may be sued for Constitutional deprivation visited pursuant to governmental "custom" even though such custom has not received formal approval through the government's official decision-making channels. *Id.* at 690-91.

Here, there is no basis for holding Hamilton County liable. Assuming that the Sheriff's Deputies were acting pursuant to some policy on May 19, it was not a policy of Hamilton County *per se.*

The Hamilton County Board of County Commissioners, acting on behalf of the county, simply does not establish or control the policies of the Hamilton County Sheriff. The powers of a county sheriff in Ohio are set forth in Chapter 311 of the Ohio Revised Code. The duties and powers conferred upon these officials are not subject to review by the Board of County Commissioners. Sheriffs' policies are their own, their powers are set forth by the General Assembly of the State of Ohio and their office exists separate and apart from that of any other county official including the Board of County Commissioners.

This is not to suggest that there may never be an appropriate § 1983 action against Hamilton County and the Board of County Commissioners. Plaintiff in this matter, however, has elected in the one instance not to name the Prosecuting Attorney of Hamilton County as a party defendant and in the other instance to dismiss the Sheriff of Hamilton County as a party defendant. An attempt to

assert a § 1983 obligation upon the county itself for the specific action of county officials is not supported in this matter.

Similarly, there is no basis for holding the City of Cincinnati liable. Although the Supreme Court has held that a municipality "may not assert the good faith of its officers or agents as a defense to liability under § 1983," *Owen* v. *City of Independence,* 445 U.S. 622, 638 (1980), it remains the law that a city may be held liable only for those constitutional deprivations visited pursuant to policy or custom, whether official or unofficial. *Id.* at 633; *Monell, supra,* at 690-91. A city may not be held liable under a *respondeat superior* theory. *Id.* at 691, *Jones* v. *City of Memphis,* 586 F.2d 622 (6th Cir. 1978), *cert. denied,* 440 U.S. 914 (1979).

Here, the only policy or custom followed by officers of the Cincinnati Police Division on May 19 was that of aiding County Sheriff's Deputies in the performance of their duties.[4] This duty is prescribed by state statute. Ohio Rev. Code § 311.07 (B). The capiases involved were issued by a *county* court and were executed by *county* officers. Authorization to enter Dr. Pembaur's offices was obtained from a *county* official. Any participation by Cincinnati Police officers in the entry and search of Dr. Pembaur's offices could only have been the result of their own conclusions, based on their own judgment, regarding the permissible scope of their assistance.[5] An attempt to hold the City of Cincinnati liable for the judgments of its indivi-

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[4] The Court notes that Dr. Pembaur, not the county deputies, summoned the Cincinnati Police.

[5] Indeed, the lengthy delay between the arrival of the Cincinnati Police officers and the entry into Dr. Pembaur's offices indicates that those officers were unsure as to the proper procedure to be followed.

dual officers is an attempt to assert *respondeat superior* liability and must fail. *Monnell, supra,* at 691. *See also Leonhard* v. *United States,* 633 F.2d 599, 622 (2nd Cir. 1980), *cert. denied,* 451 U.S. 908 (1981).

III. Conclusions of Law

(A) This Court has jurisdiction pursuant to 42 U.S.C. § 1983.

(B) Plaintiff's claims against defendant Russell Jackson are barred by the doctrine of *res judicata.*

(C) Defendant William Whalen is entitled to good faith immunity from liability for his participation, as Assistant Prosecuting Attorney, in the incidents of April 26 and May 19, 1977. *Harlow* v. *Fitzgerald,* — U.S. —, 102 S.Ct. 2727 (1982); *Imbler* v. *Pachtman,* 424 U.S. 409 (1976); *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974); *Walker* v. *Cahalan,* 542 F.2d 681 (6th Cir. 1976), *cert. denied,* 429 U.S. 1092 (1977).

(D) Defendant Russell Jackson is entitled to good faith immunity from liability, *Id.*

(E) Defendant Hamilton County Sheriff's Deputies and officers of the Cincinnati Police Division are entitled to good faith immunity for their activities in this matter. *Harlow* v. *Fitzgerald, supra; Scheuer* v. *Rhodes, supra.*

(F) Both Hamilton County and the City of Cincinnati are "persons" within the meaning of 42 U.S.C. § 1983. *Monnell* v. *New York City Dept. of Social Services,* 436 U.S. 658 (1978); *Mt. Healthy Board of Education* v. *Doyle,* 428 U.S. 274.

(G) Neither Hamilton County nor the City of Cincinnati is liable herein, as plaintiff suffered no Constitutional deprivation visited pursuant to a policy or custom of either entity.

(H) In accordance with the foregoing, plaintiff's Complaint should be and it is hereby DISMISSED at plaintiff's costs.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court